IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-372

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; and BELL TELEPHONE LABORATORIES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

## PETITIONERS' REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

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### STATEMENT

The Government's brief in opposition to the petition effectively asks the Court to close its eyes to the stark realities of this case. As pointed out in the petition (p. 15), this case as presently postured would almost certainly be the most lengthy, expensive and burdensome proceeding in the history of American law—one that the Attorney General himself has characterized as possibly so inherently complex as to be "beyond the capacity of the courts" (p. 22), and one which already has been further complicated by the legal uncertainty surrounding the very issues now sought to be presented to this Court (p. 23). The Government does

not directly deny any of these realities; instead, it largely ignores them, apparently in the hope that the Court will treat the case as though they do not exist. The result of this strategy is a Pollyanna-like presentation which treats the issues set forth in the petition as mere procedural problems, which treats petitioners' request for immediate review of those issues as an effort to avoid merely routine discovery burdens, and which treats the need for resolution of such issues as a matter of relative insignificance that can and should be dealt with by the district court during the course of such discovery. Consequently, before responding in detail to the Government's arguments, it seems critical to restore the issues presented by the petition to their proper perspective.

This is not an ordinary, run-of-the-mill lawsuit; quite the contrary, it is enormous even when compared to other major Government civil antitrust suits under Section 2 of the Sherman Act. The Government's complaint attacks virtually every tariff filed by the Bell System over the past 75-100 years and would require the re-litigation of hundreds of regulatory proceedings, many of them lengthy proceedings in themselves; it would require an investigation, not only of the evidence and arguments presented in those regulatory proceedings, but of the internal discussions that preceded and surrounded them as well; and it would open to challenge virtually every transaction between the constituent parts of the Bell System since its inception almost a century ago. The petition for certiorari does not merely seek interlocutory guidance with respect to the conduct of such a case but presents fundamental issues of whether the district court may properly assert antitrust jurisdiction over all, or any



part, of the Government's complaint. Hence, a resolution of the issues presented by the petition would go, not to some merely interlocutory matter of relative insignificance, but to the very justification for the suit itself.

The bulk of the Government's arguments are simply irrelevant to issues of this nature. Consequently, petitioners believe that the Court can and should grant the petition on the basis of the submissions of the parties as they now stand. However, in view of the critical importance of immediate review in this case and out of an abundance of caution lest the Court be misled by the Government's approach, petitioners will deal with each of the Government's principal lines of argument in this reply.

## I. REVIEW OF THE ISSUES PRESENTED BY THE PETITION IS AN ENTIRELY PROPER AND PRACTICAL EXERCISE OF THIS COURT'S POWERS AND ONE WHICH, UNDER THE DECISIONS OF THIS COURT, IS NECESSARY IN VIEW OF THE FAILURE OF THE LOWER COURTS TO RESOLVE THOSE ISSUES.

The one thing that emerges with clarity from the Government's opposition to the petition for writ of certiorari is that the jurisdictional issues raised by the complaint in this case have not even been considered, much less resolved, by the courts below. The Government concedes that the district court held only that petitioners do not enjoy a "*blanket immunity* from *all* violations of the antitrust laws which they *might* commit in the fields of communications services and equipment" (Opposition, pp. 10-11) (emphasis supplied). At the same time, the Government admits that the complaint in this case does not present such an issue, for the complaint "focuses upon *specific* areas of al-

leged misconduct" (*id.*, p. 13 n.18) (emphasis supplied). The four "specific areas of alleged misconduct" involved in this case are succinctly set forth in the Government's opposition as follows (*id.*, p. 4):

> "The complaint alleged that the defendants and co-conspirators had violated Section 2 [1] by obstructing the interconnection of other communications common carriers with AT&T, [2] by obstructing the interconnection of customer-provided terminal equipment with the Bell system, [3] by refusing to sell terminal equipment to Bell subscribers and [4] by restricting AT&T purchases of telecommunications equipment requirements to Western Electric."

Petitioners submit that it is plain from the Government's own description of its complaint that this case has nothing whatever to do with "blanket immunity." Petitioners have not claimed, are not claiming and need not claim "that they have an implied, blanket immunity from *all* violations of the antitrust laws which they *might* commit (Opposition, p. 10) (emphasis supplied). Quite the contrary, their claim has been and continues to be nothing more nor less than that they are entitled to antitrust immunity with respect to the violations *actually* alleged by the Government in this case. Specifically, petitioners claim that an antitrust complaint against a pervasively regulated telecommunications common carrier enterprise cannot properly be predicated upon the terms and conditions under which that enterprise has offered telecommunications equipment to the public as a part of its service, upon its interconnection tariffs, either with respect to equipment or with respect to other common carrier systems, or upon the intra-enterprise relationships through which it assures itself of the availability of the facilities and equipment necessary to discharge its statutory obligation to provide service. Since the district court concerned itself with the hypothetical claim of "blanket immunity" and ignored the concrete issues actually raised by the complaint, none of these claims was considered below—and the Government does not even suggest otherwise.



Instead, even while implicitly recognizing that the district court did not undertake to resolve the issues actually before it, the Government urges this Court to deny review at this time on the theory that the responsibility for such resolution is that of the district court (Opposition, p. 13, n.18), and that it would be "improper" and "impractical" for "this Court to undertake the district court's function" (*id.*, p. 14). With all due respect, this position seems to petitioners to be irresponsible. Given the unparalleled nature of the burdens in this case—not only upon defendants, but upon the Government as plaintiff, upon other companies in the telecommunications industry that will necessarily become involved in the discovery in the case, upon the courts and upon the general public--the need for a prompt resolution of the fundamental jurisdictional issues involved is clear. Although petitioners are in full agreement with the Government that the initial responsibility for the resolution of such issues was that of the district court, the plain fact is that it failed to discharge that responsibility.[1] Given that fact,

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[1] Moreover, the Government was at least partly to blame for the district court's failure to resolve the issues actually before it, since, as pointed out in the petition (pp. 9-11), the Government repeatedly changed its position in that court and deliberately sought to create the impression that only a holding of blanket immunity would justify dismissal of any part of its complaint.

and the totally unacceptable consequences of further delay in the resolution of such fundamental issues, this Court can and should exercise its powers to make certain that those issues are resolved immediately.

Certainly, the Government's contention that immediate resolution by this Court would be "improper" and "impractical" is unsound. The only argument offered in support of this contention by the Government is that "there has been little discovery in this case" (Opposition, p. 5) and hence the Court is faced with a largely "undeveloped record" (*id.*, p. 14). The Government does not explain, however, how discovery could be in any way helpful to the resolution of the fundamental jurisdictional issues raised by the four specific charges in its complaint. Indeed, at no time in the lengthy proceedings on the jurisdictional issue in the district court, in the court of appeals, or in this Court has the Government ever attempted to identify a single fact relevant to the issues presented here as to which further discovery would be useful. In these circumstances, the Government's vague suggestion that the record in this case is somehow inadequate for the immediate resolution of the jurisdictional issues seems like nothing more than a deliberate effort to delay a decision on those issues.

There is no need or justification for such delay. The record in this case is more than adequate to dispose of the jurisdictional issues with respect to each of the four specific areas of alleged misconduct involved in the Government's complaint. Thus, the record shows that each of the Government's charges relates to a matter that is unquestionably subject to common carrier regulation imposed by Title II of the Communications Act and complementary state regu-



latory statutes.[2] It is equally apparent that the nature of the regulation to which those matters are subject is inherently repugnant to the unidimensional standard of competition embodied in the antitrust laws. Finally, it can hardly be questioned that the powers conferred upon the regulatory agencies by these statutes have been vigorously exercised with respect to each and every charge embodied in the Government's complaint. Indeed, the Government's own opposition reveals this fact, for the description of the charges in the complaint which it presents in opposition to the petition is embellished with citations to numerous decisions of the FCC which the Government candidly concedes involve the very matters embraced within its charges in this case (Opposition, pp. 6-10). The Government's unsupported assertion that additional discovery is somehow

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[2] Although the Government suggests that petitioners' claims of antitrust immunity somehow present a different problem insofar as they depend on the existence of state regulatory statutes (Opposition, p. 21), this is clearly not so. Under the Communications Act, state regulation stands on the same footing as federal regulation insofar as the inapplicability of the antitrust laws to pervasively regulated matters is concerned because state regulation, which generally establishes the same kind of pervasive scheme as Title II of the Communications Act, is a part of the federal policy established by that Act. See 47 U.S.C. §§ 152(b)(1), 153(e)(3), 221(b), and 410(a). Thus, in the few instances where the FCC is excluded from jurisdiction over interstate services, Congress made it clear that this exclusion was dependent upon the existence of state regulation, which Congress regarded as functionally equivalent from the standpoint of effectuating its policies. See 47 U.S.C. §§ 153(e)(3) and 221(b). Consequently, the applicability of the antitrust laws to the pervasively regulated activities of telecommunications common carriers must be tested by the same standards, whether such regulation is directly the responsibility of state or federal agencies, and the cases in the telecommunications industry involving state public utility regulation have followed this reasoning. See, *e.g.*, *Mobilfone* v. *Commonwealth Telephone Co.*, 428 F. Supp. 131 (E.D. Pa. 1977).

necessary before the jurisdictional issues in this case can be resolved is thus flatly contradicted by the undisputed facts that are before this Court.

In these circumstances, resolution of the jurisdictional issues before discovery or trial is not only proper and practical but is also affirmatively required by the decisions of this Court. In *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), for example, the Court rejected a similar contention, advanced in that case by the Government as *amicus curiae*, that resolution of a potential conflict between the antitrust laws and a regulatory statute could be resolved only on the basis of a full factual record (*id.* at 686, 688):

> "The United States, as *amicus curiae*, suggests not only that the immunity issue is ultimately for the courts to decide, but also that the courts may reach the decision only on a full record. . . . We disagree. . . .
>
> * * * * *
>
> "We believe that the United States, as *amicus*, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity."



The *Gordon* decision thus recognizes the enormous burdens of antitrust litigation and sets forth a practical rule that potential conflicts between the antitrust laws and regulatory statutes should be resolved at the earliest practical moment. This is precisely the rule for which petitioners contend in this case where the unprecedented burdens involved cry out for such a practical approach.

The fact that this is a Government civil antitrust suit while *Gordon* was a private, treble-damage action does not in any way undercut the applicability of the *Gordon* rule here. Indeed, on the same day this Court decided *Gordon*, it applied the same rule in affirming the dismissal of the Government's complaint in *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). In that case, the Government was contending, just as it contended in *Gordon*, that a full factual record was necessary to the resolution of the immunity issue created by the potential conflict between the antitrust laws and a scheme of regulation (Brief for the United States in *United States* v. *National Ass'n of Securities Dealers, Inc.*, pp. 16-17). The Court rejected this contention in *NASD*, just as it had in *Gordon*, and thus made it plain that the practical rule requiring a threshold determination of such issues wherever practical is equally applicable to Government civil antitrust suits.

The appropriateness of resolving the fundamental jurisdictional issues arising from Government civil antitrust complaints against regulated companies prior to discovery and trial, as well as the appropriateness of immediate judicial review of such threshold jurisdictional determinations, is also strongly confirmed by the decisions of this Court in *United States Alkali Export*

*Association* v. *United States,* 325 U.S. 196 (1945), and *Far East Conference* v. *United States,* 342 U.S. 570 (1952). In each of those cases, this Court exercised its power to review by writ of certiorari under the All Writs Act an interlocutory order denying a motion to dismiss a civil antitrust complaint brought by the United States. These decisions establish that review under the All Writs Act is appropriate where, as in the present case, the question presented goes to the jurisdiction of a district court to entertain an antitrust complaint with respect to matters subject to regulation by a federal agency; where, as here, review by appeal is foreclosed by the Expediting Act; and where, as here, a failure to review the decision below prior to final judgment would result in serious hardship from protracted and potentially unnecessary litigation that might frustrate the congressional policy embodied in the regulatory scheme.

The Government does not even mention *United States Alkali* and *Far East Conference* in its opposition; nor does it discuss those aspects of *Gordon* and *NASD* which rejected the contention that issues going to the very propriety of the assertion of antitrust jurisdiction ought to be deferred until after discovery or trial. Instead, the Government relies upon what it refers to as "the well-established policy against interlocutory review in government civil antitrust cases" (Opposition, p. 12) and urges the Court to deny certiorari on the theory that a grant of the petition would involve "piecemeal review of interlocutory decisions" (*id.*).

Petitioners submit that there is no "well-established policy" of the kind to which the Government refers and that, in any event, the grant of the petition for certiorari here has nothing whatever to do with "piece-



meal review." While it is doubtless true that mere procedural rulings in a government civil antitrust case should not be reviewed except in unusual circumstances, *United States Alkali* and *Far East Conference* hold that where review is sought on an issue that may completely dispose of the case, different considerations are present. The review of such an issue does not involve a "piecemeal" approach to a government civil antitrust case but, instead, reflects a common sense recognition that where there is a serious question as to the jurisdiction of an antitrust court to entertain a Government civil antitrust complaint at all, that question ought to be resolved before the case proceeds, notwithstanding any general policy against interlocutory review.

That is precisely what is involved in the issues presented in the petition here, and that is all that is involved. Hence, every consideration of justice, reason, and common sense requires that the petition here be granted, for, as was the case in *United States Alkali* and *Far East Conference,* there is simply no other way in which these issues can be resolved in a fashion sufficiently timely to prevent a wholly senseless waste of the resources of the parties, numerous non-parties, and the public and a serious disruption of the statutory scheme under which telecommunications common carriers are regulated. Since the district court and the court of appeals refused to resolve the fundamental jurisdictional issues, the responsibility clearly falls upon this Court to grant review and either itself to resolve those issues or to direct the lower courts to do so.

Moreover, in this case there is an important additional factor which makes immediate review by this Court even more imperative than it was in *United States Alkali* and *Far East Conference.* In its decision

below the district court applied a demonstrably erroneous standard in passing on the implied immunity question—an error which, unless corrected at this time, will make it impossible for the district court ever properly to resolve the jurisdictional issues with respect to the four specific areas of alleged misconduct involved in the Government's complaint. As pointed out in the petition (pp. 11-12), the district court viewed the decisions of this Court in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), and *United States* v. *Radio Corp. of America,* 358 U.S. 334 (1959), as controlling on the jurisdictional issues presented by the complaint in this case, even though in both of those cases this Court upheld the assertion of antitrust jurisdiction because—and only because—a pervasive scheme of common carrier regulation of the sort involved in this case was *not* applicable to the conduct challenged in those cases. The Government does not deny that *Otter Tail Power* and *RCA* involved no need to accommodate the antitrust laws to a pervasive scheme of common carrier regulation; nor does it deny that this Court relied upon the absence of such a scheme in reaching its decisions in those cases. Yet it attempts simply to gloss over the fact that the district court completely ignored this distinction.

The Government's approach is an invitation to disaster. Since the district court is proceeding under an erroneous legal standard, reliance upon that court to resolve the fundamental jurisdictional issues presented here can only result in a futile waste of the resources of both the parties and the courts, for the district court will never properly resolve the fundamental jurisdictional issues raised by the specific charges in the Government's complaint—either before or after discovery—so long as it adheres to the views set forth in its



opinion. If reliance is to be placed upon the district court, this Court must correct that court's erroneous view of the law; and to do so, it must grant the petition in this case.

Indeed, it should be plain that immediate review by this Court is the only way in which rationality can be injected into these proceedings. Such action will not amount to an undertaking of "the district court's function"; it will, instead, fulfill this Court's own obligation to make certain that the district courts confine themselves to their proper areas of jurisdiction and correctly discharge their own functions within those areas. As noted above, the Court can do so by granting the petition for certiorari in this case and either resolving the issues presented itself or directing the lower courts to do so in light of the clear standards of this Court's previous decisions. Both of these alternatives are plainly proper and both are practical. Petitioners urgently request that the Court adopt one of them.

## II. IMMEDIATE REVIEW IS NECESSARY TO PREVENT THE ASSERTION OF ANTITRUST JURISDICTION OVER MATTERS THAT ARE PROPERLY WITHIN THE EXCLUSIVE JURISDICTION OF REGULATORY AGENCIES.

The Government apparently recognizes the inherent weakness of its contention that this Court should not concern itself with the failure of the courts below to resolve the fundamental jurisdictional issues presented by the petition. Thus, even while conceding that the district court did not resolve the jurisdictional issues that actually were presented by the Government's complaint, the Government seeks at length to defend the district court's assertion of jurisdiction over that com-

plaint on its merits. However, this effort to supply an after-the-fact justification for the district court's action is no sounder than the Government's previous efforts to convince the Court that such action should not be reviewed. Indeed, the Government's discussion of the merits of the district court's assertion of jurisdiction only reinforces and confirms petitioners' showing that there is not the slightest tenable basis for the assertion of antitrust jurisdiction over the matters encompassed within the Government's complaint.

As already pointed out, the Government's contention, advanced at length in its discussion of the merits of the issues presented here (Opposition, pp. 14-18), that petitioners are not entitled to a blanket immunity from the antitrust laws is simply beside the point. Petitioners have never contended that they are entitled to a blanket immunity from the antitrust laws; nor, in view of the Government's statement that its complaint "focuses upon specific areas of alleged misconduct," can there be any serious contention that such immunity is necessary to justify complete dismissal of the complaint in this case. Hence, the Government's extended reliance upon Section 221(a) as precluding a claim of blanket immunity, in addition to being demonstrably erroneous on other grounds,[3] can and should be disregarded as directed at a strawman.

[3] The Government argues that the express immunity provision of Section 221(a) would be a " 'mere redundancy' if Congress had intended to confer a blanket immunity on communication carriers" (Opposition, p. 16) (citation omitted). Aside from the irrelevancy of the whole concept of blanket immunity here, this argument is demonstrably inconsistent with a long line of decisions of this Court involving common carrier regulation going back to *Keogh*



The Government's reliance (Opposition, pp. 16-17) on Section 11 of the Clayton Act (15 U.S.C. § 21) in this connection is also clearly misplaced. On its face, Section 11 gives authority to the FCC to enforce the Clayton Act only "where applicable" to telecommunications common carriers. The "where applicable" limitation shows that Congress was mindful of the inherent conflict in applying two different statutory standards to regulated activities and specifically framed Section 11 so as to permit application of the public interest standard to regulated matters and the application of the Clayton Act only to the unregulated activities of the carriers. This is precisely the way in which Section 11 of the Clayton Act has been interpreted. Thus, in *Satellite Business Systems,* 62 F.C.C.2d 997, 1073 (1977), the FCC held that, notwithstanding Section 11, only the public interest standard of the Communications Act can be applied to matters subject to its pervasive regulatory jurisdiction. In these circumstances, the Government's further quotation (p. 17) of a portion of Section 11(e) of the Clayton Act, which deals only with orders issued under Section 11, as if it ap-

v. *Chicago & North Western R. Co.,* 260 U.S. 156 (1922). The argument that the existence of an express exemption in a regulatory statute precludes a finding of any implied immunity based upon the other provisions of the statute was repudiated by this Court with respect to the Federal Aviation Act in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963), and *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973), and it has been repudiated by several lower courts with specific reference to the Communications Act. See, *e.g., International Tel. & Tel. Co.* v. *General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 (9th Cir. 1975); *Phonetele, Inc.* v. *American Tel. & Tel. Co.,* 435 F. Supp. 207, 210 n.3 (C.D. Cal. 1977).

plied to orders of the FCC under the Communications Act, represents a serious distortion of the statute.[4]

The plain fact is that no one—neither the Government nor the FCC—has seriously suggested that regulation is irrelevant to the conduct of telecommunications common carriers under Title II of the Communications Act and complementary state regulatory statutes. Indeed, the Government expressly concedes that its complaint should be dismissed if specific conflicts between antitrust and regulatory jurisdiction are found with respect to its four specific charges (Oppo-

[4] The Government's contention that antitrust immunity is not available under the Communications Act by reason of the saving clause embodied in Section 414 of the Act (47 U.S.C. § 414), which provides that the Act does not abridge or alter existing common law or statutory remedies (Opposition, p. 17), is also demonstrably unsound. Such saving clauses have uniformly been held to preserve only remedies that are *consistent* with the regulatory scheme. Thus, in *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), this Court held that Section 22 of the Interstate Commerce Act, from which Section 414 of the Communications Act was derived verbatim, preserved only those remedies that were consistent with the regulatory statute and that inconsistent remedies were impliedly repealed (*id.* at 446-47):

> "This clause . . . cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself."

Since this Court has consistently held that the application of the antitrust laws to matters central to a pervasive scheme of common carrier regulation such as that applicable to the matters involved in this case is inherently inconsistent with such regulation, Section 414 does not, and cannot, apply to the matters involved here. Moreover, the fact that the saving clause in Section 414 does not negate the existence of an implied immunity from the antitrust laws where such immunity is necessary to avoid the imposition of conflicting standards is conclusively demonstrated by the fact that in every one of this Court's decisions upholding a claim of implied immunity resulting from pervasive common carrier regulation, immunity was implied despite the presence of a saving clause substantially identical to Section 414. See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 321 (1963) (rejecting argument based upon 49 U.S.C. § 1506); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 410 (1973) (same); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936) (implying immunity despite 49 U.S.C. § 22); *Keogh* v. *Chicago & North Western R. Co.*, 260 U.S. 156 (1922) (same).



sition, p. 22) and that, even if such conflicts are not found with respect to all of the charges, the district court should dismiss any charge that does present such a conflict (*id.*, p. 13 n. 18). The issues presented in the petition relate directly to these concessions and, in petitioners' judgment, can and should be resolved on the very ground suggested by the Government. For the petition clearly shows that there is a conflict between antitrust and regulatory jurisdiction with respect to each of the Government's charges and nothing in the Government's opposition rebuts that showing.

The Government's effort to predicate a violation of the antitrust laws upon the fact that the Bell System's tariffs do not provide for the sale of terminal equipment illustrates the conflict between the antitrust laws and regulatory statutes with respect to the charges involved here. Although the Government is literally correct in its assertion (Opposition, p. 23) that the Communications Act itself does not prohibit telephone companies from selling terminal equipment, the whole structure of the Act is inconsistent with any effort to impose an antitrust duty upon telecommunications common carriers to engage in such sales. Thus, the Act imposes a direct obligation upon the carriers to provide

telecommunications service "including all instrumentalities, facilities [and] apparatus . . . incidental to" such service (47 U.S.C. §§ 153, 201) and expressly requires each carrier "to provide *itself* with adequate facilities for the expeditious and efficient performance of its service" (47 U.S.C. § 214(d)) (emphasis supplied).[5] Since the clear statutory responsibility of telecommunications common carriers is to provide end-to-end service, the Communications Act necessarily envisions that such carriers are entitled to maintain control over the facilities and instrumentalities necessary to perform their statutory obligations.

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[5] In light of these statutory provisions, the Government's characterization of the duty of telecommunications common carriers to provide end-to-end service as "self-appointed" (Opposition, p. 24) is simply incomprehensible. Indeed, this characterization not only collides directly with the definition of the duties of telecommunications common carriers as set forth in the regulatory statutes, but also ignores both the numerous decisions of state regulatory agencies which enforced the carriers' end-to-end service responsibilities (Petition, pp. 30-32) and the FCC's own recognition of the end-to-end nature of the carriers' service responsibilities in *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539 (1972):

> "The interstate (and foreign) MTS [message telephone service] and WATS [wide area telephone service] offerings of the telephone companies have historically consisted of the furnishing of facilities, including the telephone hand set, for the public to make interstate or foreign telephone calls between telephones provided by the telephone companies. Thus MTS and WATS services have been and are now offered only as complete services that include the furnishing of the telephone instrument (with certain exceptions applicable, for example, to military installations and remote and hazardous locations). Any changes in the MTS and WATS offerings whereby the telephone company would offer to provide, at the option of the customer, only a portion of such MTS and WATS services and the customer would provide the rest, would constitute a basic and substantial change in the nature of these classifications of services."



Moreover, both the Communications Act and the complementary state statutes regulating telecommunications common carriers confer upon the regulatory agencies the ultimate power to determine the terms and conditions under which any telecommunications service, and any equipment used or useful in connection with that service, may be offered to the public (47 U.S.C. § 205). Under these statutes, there can be little question that the regulatory agencies have been given the authority, upon appropriate findings under the public interest standard, either to prohibit or to require the sale of terminal equipment in accordance with their view as to which of the approaches would best serve the public interest in providing high quality telecommunications service at reasonable rates. As pointed out in the petition (pp. 30-32), this authority was actively exercised by regulatory agencies for many years generally to prohibit the sale of terminal equipment by common carriers for use in connection with regulated telecommunications services and to require that only carrier-owned, installed, and maintained equipment could be interconnected to the nationwide telecommunications network. In recent years some regulatory agencies, notably the FCC, have receded from this policy, and the interconnection of customer-owned equipment is now permitted under certain prescribed conditions. However, no regulatory agency has suggested that the public interest would be served if the Bell System sold terminal equipment.[6]

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[6] As pointed out in the petition (p. 31 n.17), the inclusion of telephone terminal equipment as an integral part of a regulated, end-to-end telecommunications service completely distinguishes this case from the situation involved in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), in which the regulation extended only to the

In these circumstances, the charge that petitioners have violated the antitrust laws by not selling terminal equipment not only collides directly with the whole structure of the Communications Act and state regulatory statutes defining the responsibilities of telecommunications common carriers to provide end-to-end service, but would seriously invade the authority of the regulatory agencies to discharge their responsibilities under those statutes. A plainer repugnancy between the assertion of antitrust jurisdiction and the regulatory scheme applicable to the provision of telecommunications common carrier services can scarcely be imagined.

The Government's attempt to apply the antitrust laws to the interconnection of customer-provided equipment is also demonstrably repugnant to the regulatory scheme. The Communications Act and state regulatory statutes confer plenary authority over the interconnection of equipment to the nationwide telecommunications network upon the FCC and state regulatory agencies. Contrary to the Government's contention, these statutes do not in any way guarantee "subscribers' freedom of choice in equipment" (Opposition, p. 24). Rather, the statutes make it clear that the interest of subscribers in using the equipment of their

"distribution of electricity" (*id.* at 585) and made no pretense of regulating the provision of lighting services or any of the electrical appliances plugged onto Detroit Edison's electrical distribution system. The Government does not directly deny that the nature and scope of the regulation involved in this case is entirely different from the regulation in *Cantor* with respect to the very factors which were determinative in that decision, but it attempts to characterize the obligation of telecommunications common carriers in such a way as to suggest that this difference should be ignored (Opposition, p. 24).



choice must be balanced by the appropriate regulatory agencies against other public interest considerations such as the safety, reliability and efficiency of the nationwide telecommunications network.

As pointed out in the petition (pp. 30-32), this balance was struck for several decades by the enforcement of a general prohibition against the interconnection of customer-provided equipment, and the gradual relaxation of that prohibition by the FCC in recent years has in every instance been carefully controlled and monitored. For example, when the FCC decided to permit the interconnection of customer-owned recording devices as a result of conditions which had developed during World War II, the Commission ordered that such interconnection be made only through "adequate connecting arrangements" designed "to protect against impairment of the telephone service . . . [and] harmful voltages or currents" and that "the furnishing, installation, and maintenance of the necessary connecting devices should be the responsibility of the telephone companies." *Use of Recording Devices,* 11 F.C.C. 1033, 1048 (1947). Seven years later, in *Jordaphone Corp.* v. *American Tel. & Tel. Co.,* 18 F.C.C. 644 (1954), the FCC essentially embraced the prohibition on the interconnection of other customer-provided equipment by holding that telephone answering devices could be interconnected to the network only to the extent that such interconnection was permissible under state or local tariffs, thereby continuing and incorporating the prohibition on interconnection of such equipment that had been established in the rulings of state regulatory agencies. And when wider interconnection of customer-provided equipment to the network resulted from the FCC's decision in *Carter-*

*fone,* 13 F.C.C.2d 420 (1968), a period of unprecedented regulatory activity with respect to interconnection followed [7] which ultimately led to the establishment by the FCC of a comprehensive registration program under which equipment may be connected directly to the network if it has been found by the Commission to comply with an elaborate set of Commission-prescribed technical standards.[8]

The Government largely ignores both this long history of intimate regulatory involvement in every aspect of the interconnection of equipment to the network and the consistent line of decisions by regulatory agencies recognizing that continued regulatory control over interconnection is essential in the public interest. Moreover, the Government also ignores the fact that at least three very recent decisions have squarely held

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[7] See, *e.g., AT&T "Foreign Attachment" Tariff Revisions,* 15 F.C.C.2d 605 (1968), 18 F.C.C.2d 871 (1969); *Interstate and Foreign MTS and WATS,* 35 F.C.C.2d 539 (1972), 53 F.C.C.2d 221 (1975), 56 F.C.C.2d 593 (1975), 58 F.C.C.2d 716, 736 (1976), 59 F.C.C.2d 83 (1976), FCC 76-928 (Oct. 18, 1976), *aff'd sub nom. North Carolina Util. Comm'n* v. *FCC,* 552 F.2d 1036 (4th Cir. 1977), *cert. denied,* —— U.S. —— (Oct. 3, 1977); National Association of Regulatory Utility Commissioners, Committee on Communications, *Report After Investigation* (May 15, 1974). Independent investigations concerning the interconnection of customer-provided terminal equipment were also instituted by at least seventeen different state regulatory agencies.

[8] The regulations for the Commission's registration program (47 C.F.R. §§ 68.1 *et seq.*) comprise 82 pages of procedures and technical specifications or performance criteria that must be met under specified conditions of vibration, temperature and humidity, including standards relating to shock, metallic voltage surge, and longitudinal voltage surge (47 C.F.R. § 68.302), current leakage limitations (47 C.F.R. § 68.304), signal power limitations (47 C.F.R. § 68.306), longitudinal balance limitations (47 C.F.R. § 68.310), on-hook impedance limitations (47 C.F.R. § 68.312), and minimum call duration requirements (47 C.F.R. § 68.314).



that the regulation of all aspects of the interconnection of terminal equipment to the nationwide telecommunications network under the regulatory public interest standard is plainly repugnant to the simultaneous application of the antitrust laws. *Phonetele, Inc.* v. *American Tel. & Tel. Co.,* 435 F.Supp. 207 (C.D. Cal. 1977); *Dasa Corp.* v. *General Telephone Co. of California,* 1977-2 Trade Cases ¶ 61,610 (C.D. Cal. 1977); *Western Electric Co.* v. *Milgo Electronic Corp.,* Case No. 74-1601-Civ-CA (S.D. Fla., Sept. 20, 1976), *appeal pending,* No. 76-4079 (5th Cir.). These decisions, which apply the very principle for which petitioners here contend, reflect a recognition of the proper role of regulation in the interconnection of customer-provided equipment that totally discredits the view advocated by the Government.[9]

The regulatory scheme applicable to the tariffs of the Bell System that deal with interconnection of other carrier systems is also plainly repugnant to the application of the antitrust laws. As pointed out in the petition (pp. 33-34), Section 201(a) of the Communications Act makes clear that the duty of carriers "to establish physical connections with other carriers" exists only "in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or de-

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[9] Ironically, in one of its own submissions to the FCC in the *Registration* proceedings, the Antitrust Division of the Department of Justice recognized the crucial importance of considerations other than competition in the formulation of interconnection policy (Reply Comments of Department of Justice, dated January 16, 1974, at 23):

> "We do not suggest, and no responsible party would, that the Commission should ignore the problems of network safety and efficiency. . . ."

sirable in the public interest." In attempting to support its charge that an antitrust violation can be predicated upon the failure of petitioners to provide some interconnections *before* hearing and order of the FCC, the Government completely distorts the language of Section 201(a), characterizing that section as one that merely "*empowers the Commission* to order one carrier to interconnect with another where the public interest would be served thereby" (Opposition, p. 25) (emphasis supplied). The language of the section, however, deals, not with the powers of the Commission, but with the *duties of common carriers,* and the section expressly defines those duties to include a duty of interconnection only "where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest."

The Government's effort to impose upon common carriers a duty to interconnect with other common carrier systems directly contrary to that defined in Section 201(a) graphically illustrates the conflict with regulation that is inherent in the Government's entire complaint. The Government's position would effectively eliminate the provisions of the Communications Act defining the carrier's obligations, and thus would impair the authority to regulate, for the public interest standard under which regulatory agencies are obligated to consider requests for interconnection may be, and frequently is, inconsistent with any antitrust obligation of unrestricted interconnection.[10]

[10] As the Court of Appeals for the District of Columbia recently pointed out, the Commission recognized in its *Specialized Common Carrier* decision that interconnection by general service carriers with specialized carriers inevitably involves "a certain amount of 'cream-skimming'." *American Tel. & Tel. Co.* v. *FCC,* 539 F.2d 767, 774 (D.C. Cir. 1976), *aff'g United States Transmission Systems, Inc.,* 48 F.C.C.2d 859 (1974). Since such "cream-skimming" has effects upon the general service carriers that may be contrary to the public interest, it must be controlled through careful "monitoring," and the court of appeals pointed out that the FCC itself recognized this fact (539 F.2d at 774). The position of the Government simply ignores the responsibility of the FCC to monitor such "cream-skimming" and, in fact, would deprive it of the power to do so. In this respect, the Government's position is flatly inconsistent with this Court's holding in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm'n,* 341 U.S. 329, 334 (1951).



The Government's contention that the application of the antitrust laws to telephone company equipment purchasing policies "would not *necessarily* interfere with the regulatory scheme" (Opposition, p. 28) (emphasis supplied) on its face falls short of the finding, required by the decisions of this Court, that regulated conduct will not be subjected to inconsistent standards if the antitrust laws are applied. The Government concedes that the regulatory agencies have the power effectively to control both the prices paid by petitioners for equipment and the rate of return earned by Western Electric and Bell Laboratories (Opposition, pp. 26-27), and further concedes that in a recent proceeding the FCC has actively asserted its authority over petitioners' equipment purchase decisions and "ordered AT&T to change its equipment purchase decision-making system" (Opposition, p. 27 n.31).[11] As a result of this close regulatory supervision, the purchasing practices of the Bell System are significantly different from those that would have resulted

[11] The Government makes frequent reference to this proceeding (*AT&T Charges for Interstate Telephone Service,* 64 F.C.C.2d 1 (1977)), to suggest that the FCC condemns the Bell System's vertically integrated structure and its practice of purchasing substan-

under competitive conditions. Nevertheless, the Government argues that the antitrust laws can be applied to petitioners' equipment purchasing practices because petitioners could comply with the statutory duties imposed upon them by the Communications Act and yet follow practices which are still more favorable to the promotion of competition (Opposition, p. 27).

This contention again reveals the unsoundness of the Government's position in this case. Although the matters challenged here are all committed to pervasive regulation by administrative agencies acting under a public interest standard, the Government would superimpose the competition standard of the antitrust laws

tial amounts of its equipment requirements from Western Electric (Opposition, pp. 8, 27). This is a complete mischaracterization of the FCC's decision which in fact concluded (64 F.C.C.2d at 10):

> "[W]e find the overall performance of the Bell System has been, and continues to be excellent, generally providing high quality telephone service at reasonable rates. . ."

and that (*id.* at 23):

> "Western has high quality management and has generally performed efficiently overall, thereby benefitting telephone ratepayers."

The Government is also in clear conflict with the FCC when it asserts that the FCC has no regulatory authority over Western Electric and Bell Labs, for the FCC has unequivocally stated that it has substantial regulatory authority over the entire vertically-integrated Bell System structure (*id.* at 12-13):

> "[T]he statutory scheme of the Communications Act, in particular, Sections 1, 4(i), 4(j), 303, 403 and Title II generally (especially Sections 201-05 and 217-220) require us to ensure that adequate service and reasonable rates and regulations result from the vertically-integrated Bell System structure."

The FCC has also asserted authority "to take independent regulatory action" with respect to Bell-Western dealings (*id.* at 14), and over "fundamental Bell System policies, regulations and practices which govern the relationships and joint activities of the Bell System entities" (*id.* at 12).



upon these matters, thereby wholly depriving the regulatory agencies of the discretion conferred upon them by statute to develop policies other than those which are the least anticompetitive.[12] This approach is plainly repugnant to the regulatory scheme established by Congress for telecommunications common carriers, for it would unquestionably prevent that scheme from functioning in the manner intended by Congress (see Petition, pp. 18-20).

Thus, the requirements of this Court's decisions in *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). are fully satisfied with respect to each of the charges set out in the Government's complaint. As pointed out in the petition (pp. 24-25), these decisions require the recognition of antitrust immunity with respect to matters actively regulated under a standard different from, and inconsistent with, the unidimensional competition standard of the antitrust laws, and the Government does not seriously contend otherwise. Indeed, the Government concedes that *Gordon* holds that antitrust immunity must be implied whenever a regulatory statute embodying a standard different from competition "contemplate[s]" that the companies subject to such

[12] The least restrictive alternative approach which the Government seeks to impose on the FCC was specifically rejected by the Court of Appeals for the District of Columbia Circuit in *Home Box Office, Inc.* v. *FCC*, —— F.2d ——, ——, 40 R.R.2d 283, 322 n.67 (D.C. Cir. 1977):

> "We do not agree with the suggestion of some petitioners that the Commission must demonstrate that the means it has chosen have the least impact on competition consistent with achievement of the Commission's purposes."

regulation may engage in conduct of the kind challenged in an antitrust suit. (Opposition, p. 20 n.23). Since each of the charges in this case relates to conduct in which the Communications Act and complementary state regulatory statutes clearly contemplate that telecommunications common carriers may engage, the challenged conduct is immune from the antitrust laws even under the Government's view of *Gordon*. Indeed, the situation here is even more compelling, since much of the conduct challenged by the Government has been required or actively encouraged by the responsible regulatory agencies.

Moreover, as pointed out in the petition (pp. 25-26), the claim of antitrust immunity involved here is supported by a consistent line of decisions of this Court holding that matters at the heart of a pervasive scheme of common carrier regulation are immune from the antitrust laws. *Keogh* v. *Chicago & North Western R. Co.*, 260 U.S. 156 (1922); *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936); *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973). One could hardly imagine charges more directly related to the heart of a scheme of common carrier regulation than those advanced in the Government's complaint in this case. Yet, the Government does not even attempt to deal with petitioners' analysis of the decisions of this Court or with their demonstration that these decisions can only be rationalized by recognition of this principle.[13]

[13] The Government purports to find some exceptions to the principle that matters central to a pervasive scheme of common carrier regulation are immune from the antitrust laws in a few lower court decisions (Opposition, p. 15 nn. 19, 20), but the cases cited by the Government are all either ancient decisions involving telephone companies which were decided long before the telephone industry was subjected by Congress to pervasive regulatory controls or cases which have no factual similarity to this case. More importantly, however, the Government completely ignores a consistent line of recent lower court decisions which hold that pervasively regulated conduct of telecommunications common carriers—including some of the very conduct alleged by the Government in this case—is impliedly immune from the application of the antitrust laws because those laws are plainly repugnant to such regulation. See *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 435 F. Supp. 207 (C.D. Cal. 1977); *Dasa Corp.* v. *General Tel. Co. of Cal.*, 1977-2 Trade Cases ¶ 61,610 (C.D. Cal. 1977); *Mobilfone* v. *Commonwealth Tel. Co.*, 428 F. Supp. 131 (E.D. Pa. 1977); *Citizens Utilities Co.* v. *American Tel. & Tel. Co.*, Civil No. 39483-WJF (N.D. Cal., Apr. 1, 1977), *appeal pending*, No. 77-1941 (9th Cir.); *Western Electric Co.* v. *Milgo Electronic Corp.*, No. 74-1601-Civ.-CA (S.D. Fla., Sept. 20, 1976), *appeal pending*, No. 76-4079 (5th Cir.).



Instead, the Government resorts to the tactic, upon which it successfully relied both in the district court and in the court of appeals, of citing and discussing a whole variety of cases dealing with regulatory statutes that do not remotely resemble those involved here, as though those cases involve pervasive schemes of common carrier regulation.[14] However, the Government does not, and cannot, deny that this Court has *never* upheld the assertion of jurisdiction over an antitrust complaint based upon charges related to matters subject to a pervasive scheme of common carrier regulation. Indeed, the Government's only serious discussion of the significance of pervasive common carrier regulation is an attempt to distort the Court's decision in the *Keogh* case—a case in which the Court upheld antitrust im-

[14] The Government also suggests that some of the conduct complained of was subsequently found to be "in violation of the Communications Act and Federal Communications Commission policy" (Opposition, p. 6)—a contention which it nowhere explains or sup-

munity—into a case which supports its position here and a related effort to rewrite the Court's decision in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945) —a case in which the Court upheld the assertion of antitrust jurisdiction only because the matter involved was *not regulated*—to fit the facts of this case. The Government's treatment of *Keogh* is not only strained and demonstrably unsound, but it rests upon a theory which has been expressly repudiated by this Court.[15] And its treatment of *Georgia* v. *Pennsylvania* collides

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ports, but one which, in any event, is irrelevant to the issues presented here. As pointed out in the petition (p. 33 n.20), a violation of a regulatory statute provides no basis for the assertion of antitrust jurisdiction where, as here, the regulatory statute provides a complete "self-contained remedial scheme" for any violations of its provisions. *Terminal Warehouse Co.* v. *Pennsylvania R. Co.*, 297 U.S. 500 (1936). Moreover, Section 401 of the Communications Act (47 U.S.C. § 401) empowers the Attorney General to enforce the provisions of the Act or any order of the Commission in any federal district court. See *United States* v. *Gris*, 247 F.2d 860 (2d Cir. 1957). Hence, if the Antitrust Division is genuinely concerned with enforcing compliance with the Communications Act, it has ample means, independent of the antitrust laws, to accomplish that end.

[15] The Government attempts to avoid the actual holding of *Keogh* by contending that the Court in *Keogh* also "held that the [Interstate Commerce] Act, as amended by the Transportation Act of 1920 . . . , did not bar the United States from enforcing the Sherman Act's injunctive and criminal provisions against carriers" (Opposition, p. 20 n.22). In fact, however, the only holding in *Keogh* was that an antitrust action brought against a carrier in 1914—six years before the enactment of the Transportation Act of 1920—was plainly repugnant to the pre-1920 regulatory controls over carrier rates. The so-called second holding which the Government purports to see in *Keogh* is based upon a tentatively phrased



head-on with the explicit language of the decision in that case.[16]

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and subsequently repudiated *obiter dictum* in the opinion that Commission approval of the rates challenged in *Keogh* "would not, *it seems*, bar proceedings by the government" (260 U.S. at 162) (emphasis supplied)—a dictum which was premised upon the Court's earlier decisions in *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), and *United States* v. *Joint Freight Traffic Ass'n*, 171 U.S. 505 (1898), decided long before the Transportation Act of 1920 created a pervasive scheme of regulation for railroads (see Petition, p. 25 n.11). This dictum was directly repudiated in *Far East Conference* v. *United States*, 342 U.S. 570 (1952), in which the Government, relying upon *Keogh*, attempted to distinguish the Court's previous decision in *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), on the ground that *Cunard* involved a suit by a private party and was, therefore, not binding in a suit brought by the Government (Brief for the United States in *Far East Conference* v. *United States*, pp. 31, 36, 38). This Court rejected this distinction and the *Keogh* dictum, holding that the antitrust immunity which flows from pervasive regulation is fully applicable to suits brought by the Government (342 U.S. at 576):

> "The sole distinction between the *Cunard* case and this is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard* case. . . . The same Antitrust Laws and the same Shipping Act apply to the same dual rate system. To the same extent they define the appropriate orbits of action as between the court and the Maritime Board."

[16] The Government attempts to brush aside the circumstances pointed out in the petition (pp. 26-27) which led to the decision in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945), by arguing that the deliberate refusal of Congress on two separate occasions to subject railroad rate bureaus to ICC regulation was mentioned by the Court "only in passing" and was "not central to the holding" of that case (Opposition, p. 19 n.22). This contention is flatly contradicted by the opinion of this Court (324 U.S. at 457):

> "Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. ***In view of this history*** we can ***only*** conclude that they have no immunity from the anti-trust laws." (Emphasis supplied.)

The plain fact is that there is no authority that supports the Government's position in this case. Matters subject to regulation under a standard different from and inconsistent with the unidimensional competition standard of the antitrust laws, and matters lying at the heart of a pervasive scheme of common carrier regulation, have consistently been recognized to be immune from the antitrust laws. Thus, what the Government really seeks here is not to apply existing legal principles to petitioners' conduct, but to have the courts change those principles so that the antitrust laws can be retroactively applied to conduct for which such laws were never intended.

## CONCLUSION

Despite the complexity of the regulatory context out of which it emerges, this case is actually a very simple one. The Communications Act and comparable state regulatory statutes unquestionably place pervasive regulatory controls upon petitioners, including controls over the kinds and the quality of the equipment and services they offer, their right and obligation to provide service to any particular class of customers, their relationships with other companies in the industry, their rates, and their profits. Every decision of this Court involving the issue of the applicability of the antitrust laws to regulated industries has recognized that those laws do not apply to matters subject to such pervasive controls. Yet the Government seeks to prosecute an antitrust complaint against petitioners which the proceedings in this case have shown to relate entirely to such matters.

The maintenance of this action cannot possibly serve to further the purposes of the antitrust laws; nor,



indeed, can it serve any genuinely useful or legitimate purpose at all. The district court is being asked to undertake the trial of a huge case involving virtually every activity that has gone on in the telecommunications industry over the past 75-100 years, even though all of these activities are subject to the jurisdiction of regulatory agencies, and have in fact been considered in depth and over a considerable period of time by those agencies. Moreover, the Government would have the courts ignore the fact that the responsible regulatory authorities have developed a series of rules to govern each of the matters involved in this case, which rules are necessarily subject to constant review, reexamination, and refinement by the agencies involved. The antitrust laws were never intended to apply to such matters.

The issues presented by the petition for certiorari, although in petitioners' judgment clear in their proper resolution, are nonetheless critically important. Discovery and trial in this case would impose burdens of incredible magnitude, not only upon the courts and the parties, but also upon the public, which, because of petitioners' regulated status, would inevitably bear the burden of both sides of this litigation. In these circumstances, the proper disposition of this case under the law is clear: the case should be dismissed in its entirety on the ground that all the matters involved herein are

immune from the antitrust laws. This Court should therefore grant the petition for writ of certiorari in order to protect the parties, the courts and the public from an immense and needless waste of resources.

Respectfully submitted,

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